

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of
Policies and Rules Concerning
Toll Fraud

)
) CC Docket No. 93-292
)

REPLY COMMENTS OF THE
AMERICAN PUBLIC COMMUNICATIONS COUNCIL

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SUMMARY

The Commission can, and should, adopt a federal policy with clearly-defined rules allocating liability for toll fraud and invalidating conflicting tariff provisions. It is not enough for the Commission to adopt "guiding principles" on toll fraud because, in that case, IXCs will continue to include tariff provisions that put the entire burden of toll fraud on IPP providers. Clearly-defined rules describing parties' responsibility for preventing fraud and allocating liability for any unauthorized charges will instill a measure of fairness and stability into a "system" that now is plagued by inequity and inconsistency.

The evidence demonstrates that the Florida rules are working well and have decreased the incidence of toll fraud. The Commission should use the Florida rules as a basis for the Commission's policy on allocating responsibility for toll fraud. The Commission should broaden the scope of the Florida rules to include international direct-dial blocking, blocking of calls to the 809 area code, and safeguard against domestic direct-dial fraud.

Contrary to the claims of some carriers, IPP providers recognize their responsibility to take affirmative action to prevent fraud. Payphone providers have a responsibility to do what they can to safeguard access to the network from their equipment, but IXCs also have a responsibility to safeguard their network. Carriers should not attempt to force each of their customers to secure each individual network access point. The most efficient and effective place for fraud prevention generally is in

the networks, where protection can be centralized in a relatively small number of central office switches.

When IPP providers take the steps defined by the Commission as reasonable efforts to prevent toll fraud, they should not be billed for any unauthorized calls that are charged to the payphone. Carriers cannot be permitted to bill IPP providers for those charges and put the burden on IPP providers to seek recourse from the party whose services failed to prevent the fraud.

LECs also charge significantly inflated prices for OLS and BNS. They should be required to tariff the services at the federal level and should not be allowed to inflate the charges of OLS, BNS or IDDB. Finally, contrary to the contentions of some of the LECs, the Commission has the authority to allocate liability for the failure of the LECs' screening services and should implement a system based on the principles used in Florida, and not on the "no fault" system proposed by Bell Atlantic.

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The American Public Communications Council ("APCC") hereby submits its Reply Comments in response to comments submitted pursuant to the Notice of Proposed Rulemaking ("NPRM") released in the above-captioned docket on December 2, 1993.

I. The Commission Can, and Should, Adopt a Federal Policy Allocating Liability for Toll Fraud.

There is widespread agreement on many of the central points made by APCC in its initial comments. No party contests the fact that toll fraud is a critical problem facing telecommunications companies. Most of the parties who submitted comments agree on the need to establish a federal advisory committee.¹ Many of those submitting comments also agreed with APCC's position that the Commission should immediately adopt clearly-defined rules allocating responsibility for toll fraud.²

The contention of some of the carriers that the Commission should focus on "preventing toll fraud" rather than allocating

¹ See, e.g., Comments of BellSouth Telecommunications, Inc. ("BellSouth"), at 2; Comments of Southern New England Telecommunications Corp., at 2; Comments of GTE Corporation ("GTE"), at 30.

² See, e.g., Comments of AT&T at 18; Comments of Independent Payphone Association of New York, Inc., at 1-2.

liability³ is a red herring. As the Florida Pay Telephone Association ("FPTA") noted,⁴ this is a false dichotomy: fraud prevention and liability allocation are closely related. If the Commission correctly allocates liability for toll fraud, all parties will have incentives to increase fraud prevention, which will lead to a decrease in the incidence of fraud.

Some commenting parties argue that the Commission should only adopt general "guiding principles" addressing responsibility for controlling fraud, rather than clear-cut rules defining liability.⁵ The Commission should reject this approach. Adopting general principles regarding responsibilities for fraud prevention will not stop interexchange carriers ("IXCs") from including tariff provisions that place responsibility for fraud on independent public payphone ("IPP") providers. The Commission's procedures do not allow it to review most individual IXC tariff liability provisions before they take effect,⁶ and, in any event, the Commission lacks the resources to conduct such individualized reviews for each of the hundreds of IXCs. Thus, general principles are not sufficient. Instead, the Commission must adopt a rule that specifically allocates liability for toll fraud and that invalidates any tariff provisions that conflict with the rule.

³ See, e.g., Comments of GTE, at 2.

⁴ Comments of FPTA, at 5.

⁵ See, e.g., Comments of Sprint, at 9; Comments of Pacific Bell and Nevada Bell, at 12.

⁶ In the Matter of Tariff Filing Requirements for Nondominant Common Carriers, 8 FCC Rcd 6752 (August 18, 1993).

The support for "guiding principles" as opposed to clear rules defining liability rests on the baseless claim that adoption of specific rules apportioning liability will lead to more, not less litigation. In fact, the comments of the Florida Public Service Commission ("Florida PSC") and the FPTA demonstrate the opposite. Since implementation of the clear-cut Florida rule that is the keystone of the Commission's Notice, no complaints, problems or disputes regarding toll fraud have been brought before the Florida PSC.⁷ In addition, no IXC or LEC has sought to collect charges from IPP providers for fraudulent calls.⁸ The record in Florida shows that adopting specific rules apportioning liability will lead to a decrease in the number of disputes and litigation. Clearly-defined rules describing parties' responsibility for preventing fraud and allocating liability for any unauthorized charges will instill a measure of fairness and stability into a "system" that now is plagued by inequity and inconsistency.

Tellingly, when the LECs criticize allocating liability for toll fraud, they omit any discussion of their insulation from responsibility for fraud committed at their own payphones. As APCC detailed in its initial comments, even though IXCs' tariffs hold all customers strictly liable for all charges accrued at the payphone, LECs are never billed by IXCs for charges resulting from fraudulent calls made at or charged to their own payphones. IPP providers, on the other hand, are billed for all unauthorized calls

⁷ Comments of Florida PSC, at 3.

⁸ Comments of FPTA, at 7.

charged to their payphones. This asymmetrical distribution of liability holds true even if the IPP provider takes all reasonable steps to prevent fraud and the LEC does take adequate precautions to prevent fraud. This must be corrected.⁹ IPP providers should not be held liable for charges resulting from fraudulent calls when the LECs are insulated from liability for the same charges.

II. The Florida Rules Should Be Used as a Basis for the Commission's Policy on Allocating Responsibility for Toll Fraud.

The Commission has proposed adopting rules similar to those enacted by the Florida PSC to prescribe specific steps IPP providers must take in order to prevent fraud. In Florida, if IPP providers subscribe to Originating Line Screening ("OLS") and Billed Number Screening ("BNS"), they will not be held liable for charges resulting from calls that should have been prevented by the screening services. The Florida approach should be adopted on a federal level because it provides a very real economic incentive to IPP providers to buy screening services, encourages the LECs to guarantee that the screening services work, and prompts the LECs and IXCs to ensure that their operators recognize and act upon such screening information.¹⁰

Interestingly, most of the criticism of the Florida rules comes from parties who have had no direct experience with them.

⁹ AT&T agrees that the allocation of liability should be symmetrical. Comments of AT&T at 22, n.30.

¹⁰ Comments of FPTA, at 6.

The Florida PSC¹¹ and FPTA¹² both report very positive results from the first year of implementation of the rule. BellSouth also supports the key elements of the rule.¹³ GTE, which also provides local exchange service in Florida, claims that the Florida rules only "mask the presence of fraud," but do not actually reduce its incidence.¹⁴ However, GTE provides no evidence to support its assertion.

The Commission should build on the rules adopted by the Florida PSC to apply the same approach to other types of toll fraud. First, the Florida approach does not address international direct-dial toll fraud. The Commission should rule that if an IPP provider subscribes to IDD blocking, the IPP provider cannot be held responsible for toll charges resulting from direct-dial international calls. AT&T agrees that the Florida approach is fundamentally sound, and should apply to IDDB as well as OLS and BNS.¹⁵ However, the IXC should not be allowed to bill these types of calls to an IPP provider who subscribes to IDDB, OLS and BNS services. Having subscribed to IDDB, OLS, and BNS, the IPP provider has fulfilled its responsibility. If fraud nonetheless occurs, the IXC should address the matter of the theft of its

¹¹ Comments of Florida PSC, at 3.

¹² Comments of FPTA, at 7.

¹³ Comments of BellSouth, at 6-10.

¹⁴ Comments of GTE, at 11.

¹⁵ Comments of AT&T, at 18-27.

services directly, and not seek further recourse from IPP providers.

Second, unauthorized calls to the 809 area code are a very large problem that cannot be addressed by the current form of IDDB offered by the LECs. The Commission should require that LECs either enlarge the scope of IDDB to include the 809 area code or provide a separate service that will block calls to 809 numbers.

Third, the Commission must ensure that other safeguards are available to prevent unauthorized domestic direct-dial calls, such as safeguards against "clip-on" fraud and secondary dial tone reorigination. Here, too, the Commission should rule that once the IPP provider takes reasonable, clearly defined steps it cannot be held liable for charges resulting from fraud.

Several commenting parties argue that there are additional steps IPP providers can take aside from subscribing to fraud prevention services;¹⁶ APCC agrees. AT&T's proposed policy regarding reasonable steps IPP providers can take to prevent fraud and limit their liability for operator-assisted calls is generally reasonable. APCC does not oppose giving IPP providers the responsibility of performing test calls on the blocking and screening services, but suggests that a more appropriate period during which test calls must be performed is one year, rather than the four-month period proposed by AT&T.¹⁷

¹⁶ See, e.g., Comments of NYNEX at 20; Comments of Sprint, at 12.

¹⁷ Comments of AT&T, at Appendix C.

III. The Commission's Rules Should Allocate Responsibility for Preventing Toll Fraud Among All Parties.

Contrary to the claims of MCI,¹⁸ among others, IPP providers are not seeking to avoid responsibility for taking steps to prevent fraud. Nor would carriers be the only parties liable for toll fraud under APCC's approach. Instead, APCC proposes that the Commission establish clearly-defined steps that IPP providers must take to prevent fraud. If the IPP providers fail to take those steps, they should be at least partially responsible for any fraud. However, if the steps are taken and fraudulent calls result nonetheless, IPP providers should not be held liable.

Contrary to MCI's claim, IPP providers are not arguing for "insulation" from liability or for carriers becoming IPP providers' insurers.¹⁹ IPP providers recognize their responsibility to take affirmative action to prevent fraud. Some carriers already recognize the principle that once an IPP provider takes reasonable steps to prevent fraud, he or she should not be liable for fraud.²⁰ Clearly defining all parties' responsibility for fraud prevention will increase incentives for efficient behavior.

MCI asserts that IPP providers should have sole responsibility for the costs of fraud merely because IPP providers are in the business of providing access to the public switched network.²¹

¹⁸ Comments of MCI, at 3.

¹⁹ Comments of MCI, at 11.

²⁰ See, e.g., Comments of AT&T, at 24; Comments of Bell South, at 6-10.

²¹ Comments of MCI, at 3.

This assertion is unfounded. All parties involved have some responsibility to protect the network. Payphone providers have a responsibility to do what they can to safeguard access to the network from their equipment, but IXCs also have a responsibility to safeguard their network.

There are a number of steps carriers can take to help prevent fraud. BellSouth, for instance, states that it assigns telephone numbers in the 8000-9000 range for all new payphones.²² Assigning unique payphone numbers for payphones is a highly effective means to halt international toll fraud. As proposed by both AT&T²³ and APCC, the Commission should require all LECs to adopt this procedure and expand it to include existing as well as new payphones. By contrast, the alternative suggested by GTE²⁴ -- the installation of a "cuckoo" tone device to every individual payphone -- is not an efficient method of preventing toll fraud and would be a costly burden on IPP providers. If "cuckoo" tones are deployed they should be deployed in the LECs' central offices, not in individual payphones.

Rather than attempting to force each of their customers to secure each individual network access point, carriers should work to implement safeguards in their own network that will increase the ability to prevent and detect toll fraud. The most efficient and effective place for fraud prevention generally is in the networks,

²² Comments of BellSouth, at 9.

²³ Comments of AT&T, at 27.

²⁴ Comments of GTE, at 10.

where protection can be centralized in a relatively small number of central office switches. Payphone-based solutions, on the other hand, are inherently limited because they can be bypassed. New technologies for committing fraud are continually being developed to "outsmart" or bypass the payphone instrument. Thus, payphones will always be vulnerable to fraud no matter how much "fraudproofing" is built into an individual payphone.

BellSouth discusses a number of useful measures that LECs can take to help prevent fraud. BellSouth indicates that it works to locate the network interface in ways that will minimize the possibility of physical tampering²⁵ and provides a monitoring system for early detection of unauthorized usage.²⁶ BellSouth also has deployed a software feature that can be used to address the problem of secondary dial tone reorigination.²⁷

BellSouth proposes to use pre-bill edits to remove fraudulent charges where the IPP provider has taken reasonable steps to protect the payphone from fraud.²⁸ Carriers' use of pre-bill edits is a vital requirement for ensuring the fair and efficient operation of rules that relieve IPP providers from liability. AT&T²⁹ and MCI³⁰ assert that IXCs should be able to bill IPP

²⁵ Comments of BellSouth, at 8.

²⁶ Id.

²⁷ Comments of BellSouth, at 9.

²⁸ Comments of BellSouth, at 6.

²⁹ Comments of AT&T, at 22-23.

³⁰ Comments of MCI, at 11.

providers for charges that result from the failure of LEC services, leaving IPP providers to seek recourse from LECs. The Commission should reject this position. Failure to require pre-bill edits would force IPP providers to assume liability for all calls, whether authorized or fraudulent, and wade through mountains of paper bills to determine whether they have been the victims of fraud, and then pursue the carrier whose service failure was the cause of the fraud. This requirement would place an undue administrative and financial burden on IPP providers.

BellSouth's efforts demonstrate how IPP providers and carriers can work together to prevent fraud when it is in the interest of each party to do so. Currently, however, in most jurisdictions IPP providers are expected to shoulder the entire burden of toll fraud and carriers have little incentive to help prevent fraud. As AT&T pointed out, LECs receive access charges for all calls that are made from an IPP, whether authorized or fraudulent. The ability to collect revenues from fraudulent calls may work as a disincentive to prevent fraud.³¹ In addition, LECs collect fees for providing blocking and screening services to IPP providers, but are relieved from liability even if these services fail. IXC's will also lack sufficient incentive to safeguard the network as long as they are allowed to bill their "customers" for all fraudulent calls that the IXC carriers, even when the "customer" took reasonable steps to prevent fraud.

³¹ Comments of AT&T, at 19.

IV. LECs Charge Significantly Inflated Prices for OLS and BNS and Should Be Required to Tariff the Services at the Federal Level.

In its Notice, the Commission solicited information about the availability and cost of blocking and screening services. As APCC noted in its initial comments, although IDDB is now a federally tariffed service, OLS and BNS are tariffed at the state level, and the availability of and cost for these services varies from jurisdiction to jurisdiction. The comments reveal that many LECs are charging significantly inflated prices for these fraud-prevention devices. LECs should be required to price blocking and screening services at or near their actual cost and must not be allowed to continue to profit from fraud. APCC agrees with Pacific Bell and Nevada Bell's practice of automatically providing international blocking when the payphone line is provided and providing BNS and OLS at no additional charge. Pacific Bell and Nevada Bell's claimed success in reducing payphone fraud³² may be due in large part to its offering these services at no additional charge. In Florida, screening services cost \$2.00 per line per month, notwithstanding the fact that OLS costs only \$.42 a month.³³ Even worse, NYNEX charges approximately \$3.50 per month for OLS and BNS,³⁴ and GTE charges up to \$5 per month for BNS.³⁵ To prevent

³² Comments of Pacific Bell & Nevada Bell, at 5-7.

³³ Comments of FPTA, at 10.

³⁴ Comments of Independent Payphone Association of New York, Inc., at 21.

³⁵ Comments of GTE, at 8.

such variation in the cost and availability of screening services, APCC urges the Commission to act immediately on the pending petition to require LECs to tariff OLS and BNS on the federal level.

GTE also claims that if IPP providers are held harmless for the LECs' failure to operate OLS and BNS correctly, GTE will have to increase dramatically the cost of its already unreasonably priced services.³⁶ This outrageous claim should be rejected by the Commission. The LECs currently profit from toll fraud because they collect access charges and billing fees for all completed calls whether they are authorized or fraudulent, charge rates for blocking and screening services that are far above cost, and assume no responsibility to ensure that the services work as promised. Moreover, the LECs provide these services to their own payphones free of charge and are not billed for any fraudulent calls that result on their payphones. Now the LECs claim that if they are forced to take responsibility for providing faulty service they must raise their rates to IPP providers even more. The Commission should not allow the LECs to profit even more from the enormous problem of payphone fraud.

³⁶ Comments of GTE, at 12.

V. The Commission Has the Authority to Allocate Liability for the Failure of the LECs' Screening Services.

The Commission clearly has the authority to allocate liability for failure of blocking and screening services, including if appropriate, placing liability on the LECs.

Several of the LECs strenuously object to any efforts to restrict their tariffs' limitations on liability and cite to a Supreme Court opinion from more than seventy years ago for the proposition that such limitations on liability are legal. This argument misses the point. In Western Union Telegraph Company v. Esteve Brothers & Co., 256 U.S. 566 (1921), the issue before the Supreme Court was whether a telegraph company could apply a tariff provision limiting its liability for a mistake in a telegram when the sender of the message chose not to request that the message be repeated back to him, which would provide greater assurance of accuracy for an increase in cost. The Court held only that the tariff provision was legal under the terms of the 1910 Act to Regulate Commerce. The Supreme Court did not pass on the ability of a commission with ratemaking authority to judge the reasonableness of that limitation of liability. In fact, Justice Brandeis specifically noted that "the limitation of liability . . . is attached to the unrepeat cable rate is binding upon all who send messages to or from foreign countries until it is set aside as unreasonable by the Commission." 256 U.S. at 586. Western Union only stands for the principle that a tariff provision limiting liability is enforceable as a matter of law. The case does not

affect the power of the Commission to adopt a rule holding that such provisions are unreasonable as a matter of policy.

In addition, Justice Brandeis noted that the sender of the message had the opportunity to reject that limitation of liability by requesting a different rate that provided greater assurance of accuracy in the transmission of the message. In the case of toll fraud, however, the LECs have steadfastly refused to take responsibility for the accuracy of its blocking and screening services even after charging IPP providers inflated rates for the service.

The Commission has the power and the responsibility to correct disincentives in the marketplace that fail to encourage carriers to take effective steps to prevent toll fraud. Carriers have reaped windfalls from the current market inequities that provide no incentives for them to prevent toll fraud. They are allowed to collect access charges for fraudulent calls, avoid payment for toll fraud committed at their own payphones, charge excessive rates for blocking and screening and insulate themselves from liability for the failure of these services. The Commission must take action to correct the unfairness in the allocation of liability for toll fraud and must ensure that the carriers are not allowed to raise their rates to protect the profits they receive from fraudulent calls.

The Commission should also reject Bell Atlantic's "no fault" approach to allocating liability for toll fraud, which proposes to assign responsibility for charges for fraudulent calls equally

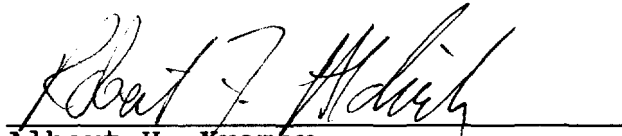
among all parties without regard to fault. Bell Atlantic's plan is internally inconsistent and is wrong as a matter of public policy. First, Bell Atlantic claims that its approach will apportion liability equally among all parties regardless of fraud if all parties have taken adequate steps to prevent fraud and fraud has nonetheless been committed. However, in a footnote Bell Atlantic continues to cling to tariff provisions that insulate it from liability for fraudulently placed calls. Thus, Bell Atlantic's claim that its proposed rule requires all service providers to share the costs of toll fraud is untrue. Bell Atlantic's self-proclaimed "no fault" means only "no responsibility" for the LECs. Second, as a matter of policy, the Commission should not impose liability on IPP providers while exempting LECs from any liability whatsoever. Even if all the parties did share liability equally, the LECs would still maintain an unwarranted advantage. IXC's and IPP providers can spread the costs of toll fraud over only a limited universe of customers while LECs can spread the costs over their entire rate base.

CONCLUSION

The Commission should rule that IXC's can no longer hold IPP providers liable for all toll fraud regardless of what steps the IPP providers took to prevent fraud. Like the Florida PSC, the

Commission should prescribe reasonable steps to prevent toll fraud and hold that IPP providers who take those steps cannot be billed from charges resulting from unauthorized calls.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Robert F. Aldrich", is written over a horizontal line.

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Dated: February 10, 1994

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of February, 1994, I caused a true copy of the Reply Comments of the American Public Communications Council to be served upon the parties listed below.

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